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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

HYDRO ALUMINIUM NORDISK AVIATION PRODUCTS, A/S,

Petitioner,

v.

PHILIP D. TORGESON AND KATHY TORGESON,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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47 pp

QUESTION PRESENTED

Where the domestic subsidiary of a Norwegian manufacturer of air cargo containers for wide-body jet aircraft leases containers to American Airlines in Los Angeles, California, is the injection of the product into the stream of commerce and the foreseeable fact that American Airlines will use the containers on aircraft passing through the Dallas/Fort Worth International Airport, without more, adequate to establish the requisite contacts giving a court in Texas personal jurisdiction over the Norwegian manufacturer in a personal injury suit arising from the use of one of the containers; a question on which this Court equally divided in *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987), and as to which the courts of appeals are in conflict.

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below in the Court of Appeals were the Petitioner Hydro Aluminium Nordisk Aviation Products, A/S, and the Respondents Philip D. Torgeson and Kathy Torgeson. Nordisk Aviation Products, Inc. – Petitioner's domestic subsidiary – was a separate defendant in the District Court, but not a party to the proceedings in the Court of Appeals or to this proceeding.

Petitioner Hydro Aluminium Nordisk Aviation Products, A/S, has the following parent companies and/or subsidiaries:

Nordisk Aviation Products, Inc.
Hydro Aluminum Bohn, Inc.
Norway: Aktieselskapet Norsk Aluminium Comp
Alplanor as
Resirk as
Fundo as
Hydro Aluminium Magnor as
Hydro Aluminium Structures as
Hydro Aluminium Vekst as
Nordisk Feral as
Hydro Aluminium Packaging as
A/S Utla
ASV Aquarius as
Hydro Aluminium Profiler as
Hydro Aluminium Formtech as
Nordisk Aviation Products as
Hydro Aluminium Jamaica as
Hydro Aluminium Equipment as
Naco Eiendom as
Vik Verk as Sweden: Naco AB
Granges Aluminium Feral AB

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner Hydro Aluminium Nordisk Aviation Products, A/S, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on July 1, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, which is unreported, is set forth at Appendix 1a-6a.

The memorandum decision of the United States District Court for the Northern District of Texas (McBryde, D. J.), which is unreported, is set forth at Appendix 9a-12a.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1332, Respondents brought this suit in the Northern District of Texas. On November 12, 1992, the District Court granted Petitioner's Motion to Dismiss for Lack of Personal Jurisdiction and entered a final judgment as to the dismissal of Respondents' claims against Petitioner. See Appendix 13a-14a, *infra*.

On Respondents' appeals, the Fifth Circuit on July 1, 1993, entered a judgment and an opinion reversing the Northern District's judgment and directing that Respondents' claims against Petitioner be remanded to the District Court for further proceedings. See Appendix 1a-8a, *infra*. Petitioner filed a Petition for Rehearing in the Court of Appeals on July 15, 1993. The Court of Appeals denied the Petition for Rehearing on August 9, 1993. See Appendix 15a-16a, *infra*.

On August 24, 1993, the Court of Appeals granted a stay of the issuance of its mandate until, and including, September 23, 1993, to permit the filing of this Petition. The stay will continue until final disposition by this Court.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Texas Civil Practice & Remedies Code § 17.042(2) states:

> In addition to other acts that may constitute doing business, a nonresident does business in this state if the nonresident:
>
> . . . .
>
> (2) Commits a tort in whole or in part in this state; . . . . [1]

The provisions of the United States Constitution involved are the Due Process Clauses of the Fifth and Fourteenth Amendments:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . .
>
> Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

[1] Because Texas long-arm jurisdiction reaches as far as is constitutionally allowed, the personal jurisdiction question in Texas is actually a federal constitutional due process inquiry. *Helicopteros Nacionales De Columbia, S.A. v. Hall*, 466 U.S. 408, 412-413 (1984); *Schlobohm v. Schapiro*, 784 S.W.2d 355, 357 (Tex. 1990).

STATEMENT OF THE CASE

As the Fifth Circuit found, the relevant facts are undisputed. Petitioner is a corporation formed and existing under the laws of the Kingdom of Norway, with its principal place of business in Holmestrand, Norway. Petitioner is engaged in the business of manufacturing and selling aluminum products, including aluminum cargo containers for use on wide-body jet aircraft.

Nordisk Aviation Products, Inc. is a New York corporation, with its principal place of business in Los Angeles, California. Nordisk Aviation Products, Inc. is 51% owned by Petitioner and 49% owned by an unrelated corporation, Mercury Air Group, Inc. which is also a New York corporation, with its principal place of business in Los Angeles, California.

Nordisk Aviation Products, Inc. is engaged in the business of selling, repairing and leasing air cargo containers to commercial airlines. Although Nordisk Aviation Products, Inc. maintains approximately 700 containers for lease, its main business is selling Petitioner's new products and not leasing used containers. Containers are repaired by Nordisk Aviation Products, Inc. in Los Angeles, California.

Respondents contend that Philip Torgeson was injured at Dallas/Fort Worth International Airport, Texas, because of a defect in an air cargo container Nordisk Aviation Products, Inc. had leased to American Airlines.

At the time of the accident alleged in Respondents' Original Complaint, Nordisk Aviation Products, Inc. had

leased approximately 250 air cargo containers to American Airlines. The lease was negotiated on behalf of Nordisk Aviation Products, Inc. entirely from Los Angeles, California. The air cargo containers were delivered f.o.b. by Nordisk Aviation Products, Inc. to American Airlines at Los Angeles International Airport. Under the Lease Agreement, maintenance of the containers is done only in Los Angeles International Airport. If the containers require maintenance, it is the responsibility of American Airlines to return the containers to Nordisk Aviation Products, Inc. at Los Angeles International Airport. Any additional maintenance performed other than by Nordisk Aviation Products, Inc. is solely at the cost and control of American Airlines.

Neither Petitioner nor Nordisk Aviation Products, Inc. has any control whatsoever as to where American Airlines uses the leased containers.

Respondents brought suit against both Petitioner and Nordisk Aviation Products, Inc. following an accident on July 6, 1990. Petitioner and Nordisk Aviation Products, Inc. moved to dismiss the complaint for lack of personal jurisdiction. (Rule 12(b)(2), Fed. R. Civ. P.) The District Court granted Petitioner's motion and denied Nordisk Aviation Products, Inc.'s Motion. In granting Petitioner's motion, the District Court said:

> "As for Defendant Hydro, the record does not reflect that it has the same kind of contacts with the State of Texas as does Defendant Aviation. Defendant Hydro is not a party to the lease agreement between American Airlines, Inc. and Defendant Aviation, pursuant to which the container that allegedly caused Plaintiff's injuries

> was brought to Texas. Although Defendant Hydro 'has sent an agent to Texas approximately once or twice a year in order to meet with American Airlines, Inc.,' regarding American's use of aluminum containers, such contact is not sufficiently continuous or systematic as to support a reasonable exercise of jurisdiction. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779-80 (1984); *Stuart v. Spademan*, 772 F.2d 1185, 1190-91 (5th Cir. 1985). The unilateral acts of Defendant Aviation in leasing containers manufactured by Defendant Hydro to a Texas corporation is not an appropriate consideration when determining whether Defendant Hydro has sufficient contacts with the forum to be haled into Court here. *Helicopteros Nationales De Columbia, S.A. v. Hall*, 466 U.S. 408, 416 (1984). The mere fact that a defendant has placed its products into the 'stream of commerce' of the forum state is not alone sufficient contact to support an assertion of general jurisdiction." (p. 11a, *infra*.)

Respondents appealed. The Fifth Circuit concluded that "Hydro Nordisk had no contacts with Texas other than as the maker of the product which allegedly caused harm" (p. 2a, *infra*) and affirmed the District Court's conclusion that Petitioner's contacts with Texas did not rise to the level necessary for general jurisdiction. The Fifth Circuit disagreed with the District Court's conclusion that there was no specific jurisdiction over Petitioner for the harm allegedly caused by its product. The Fifth Circuit explained that it adheres to the "stream of commerce" theory of specific general jurisdiction:

> "In this case, the appellants rely on a theory of specific jurisdiction based on Hydro Nordisk's having placed its product into 'the stream of

commerce.' This theory of personal jurisdiction holds that when a manufacturer injects a product into the stream of commerce, and it is reasonably foreseeable that the product will be used in the forum state, the manufacturer or distributor should be subject to the jurisdiction of that state for injuries caused by that product. *See generally*, Murphy, *Personal Jurisdiction and the Stream of Commerce: A Reappraisal and a Revised Approach*, 77 Ky. L. J. 243 (1989) (and citations therein).

"In *Asahi Metal Industry Co. [v. Superior Court of California*, 480 U.S. 102 (1987),] the Supreme Court's most recent statement on personal jurisdiction and the stream of commerce, four justices favored a narrow interpretation of the stream of commerce doctrine. An equal number of justices, while concurring in the result, refused to require a showing of 'additional conduct' under the stream of commerce doctrine. Because the court's splintered view of minimum contact in *Asahi* provides no clear guidance on this issue, the Fifth Circuit continues to use the stream of commerce standard as implied in *World-Wide Volkswagen [v. Woodson*, 444 U.S. 286 (1980),] and embraced by the circuit in a variety of cases. *Irving v. Owens-Corning Fiberglass*, 864 F.2d 383, 385-86, *cert. denied*, 493 U.S. 823 (1989)." (p. 4a, *infra.*)

The Fifth Circuit then reviewed three of its prior reported cases[2] and concluded that:

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[2] *Gulf Consol. Serv. v. Corinth Pipeworks*, 898 F.2d 1071 (5th Cir.), *cert. denied*, 498 U.S. 900 (1990); *Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081 (5th Cir. 1984); and *Oswald v. Scripto*, 616 F.2d 191 (5th Cir. 1980).

> "These cases took into account and rejected the argument of Hydro that it would be unfair to ask it to be amenable to suit 'anywhere that American flies,' as they found that Scripto and Bean Dredging were amenable to suit where their products went, when those destinations were, as here, reasonably foreseeable. . . . " (p. 6a, *infra*.)

The Fifth Circuit accordingly reversed the District Court's dismissal of Petitioner for lack of personal jurisdiction and remanded Respondents' claims against Petitioner to the District Court for further proceedings. (Appendix 7a-8a, *infra*.)

REASONS FOR GRANTING THE WRIT

I.

The question of whether mere foreseeability or awareness is a constitutionally sufficient basis for personal jurisdiction if a defendant's product makes its way into the forum state while still in the stream of commerce is a continuing source of conflict between the federal courts of appeals and state courts which has not been, but should be, settled by this Court.

This Court recognized the conflict over this issue that existed at the time of the *Asahi* decision.

> "In *World-Wide Volkswagen* itself, the state court sought to base jurisdiction not on any act of the defendant, but on the foreseeable unilateral actions of the consumer. Since *World-Wide Volkswagen*, lower courts have been confronted with cases in which the defendant acted by placing a product in the stream of commerce, and the

> stream eventually swept defendant's product into the forum state, but the defendant did nothing else to purposefully avail itself of the market in the forum state. Some courts have understood the Due Process Clause, as interpreted in *World-Wide Volkswagen*, to allow an exercise of personal jurisdiction to be based on no more than the defendant's act of placing the product in the stream of commerce. Other courts have understood the Due Process Clause and the above-quoted language in *World-Wide Volkswagen* to require the action of the defendant to be more purposefully directed at the forum State than the mere act of placing a product in the stream of commerce." *Asahi*, 480 U.S. at 110 (O'Connor, J., joined by Rehnquist, C.J., and Powell and Scalia, JJ.).

Justice Brennan, joined by Justices White, Marshall and Blackmun, disagreed with the plurality's interpretation of the stream-of-commerce theory. Justice Brennan wrote that:

> "As long as a participant in this process is aware that the final product is being marketed in the forum state, the possibility of a lawsuit there cannot come as a surprise." 480 U.S. at 117.

Justice Brennan concluded that jurisdiction premised on the placement of a product in the stream of commerce is consistent with due process principles, and no showing of additional conduct is required. *Id.*

The lower courts remain deeply divided post-*Asahi*. Most have rejected the additional conduct requirement of the *Asahi* plurality. *See, e.g., Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992); *Irving v. Owens-Corning Fiberglass Corp.*, 864 F.2d 383, 385-86 (5th Cir.), *cert. denied*,

493 U.S. 823 (1989); *DeMoss v. City Market, Inc.*, 762 F. Supp. 913, 918 (D. Utah 1991); *Abuan v. General Elec. Co.*, 735 F. Supp. 1479, 1483 (D. Guam 1990); *Curtis Management Group v. Academy of Motion Picture Arts & Sciences*, 717 F. Supp. 1362, 1369 (S.D. Ind. 1989); *Wessinger v. Vetter Corp.*, 685 F. Supp. 769, 776-77 (D. Kan. 1987); *Hall v. Zambelli*, 669 F. Supp. 753, 756 (S.D. W. Va. 1987); *Keen v. Ashot Ashkelon, Ltd.*, 748 S.W.2d 91, 93 (Tex. 1988).

Other courts have adopted the *Asahi* plurality's suggestion that additional conduct is required before the minimum contacts necessary for the exercise of personal jurisdiction can be established. *See, e.g., Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 683 (1st Cir. 1992); *Felix v. Bomoro Kommanditgesellschaft*, 241 Cal. Rptr. 670, 675 (Cal. App. 1987); *Witbeck v. Bill Cody's Ranch*, 411 N.W.2d 439, 448 (Mich. 1987).

The conflict among the lower courts is both real and substantial. While *Asahi* drew the issue into sharper focus, the Court's ultimate inability to muster a majority on either side of the issue has, by and large, only further entrenched the conflict. None of the post-*Asahi* cases suggest any new directions for resolving the issue.

II.

This case squarely presents the issue.

The only issue before both the District Court and the Fifth Circuit was whether the District Court could exercise personal jurisdiction over Petitioner. The Fifth Circuit acknowledged that "[t]he relevant facts are undisputed" and that Petitioner "had no contacts with

Texas other than as the maker of the product which allegedly caused harm." (p. 2a, *infra.*)

Whether additional conduct is constitutionally required makes a difference in this case because there is no evidence of additional conduct. For example, there is no evidence that Petitioner designed the air cargo containers for the market in Texas, advertised in Texas, established channels for providing regular advice to customers in Texas, or marketed the product through a distributor or sales agent in Texas. See *Asahi*, 480 U.S. at 112. Petitioner does not do business in Texas. It has no office, agents, employees, or property in Texas. It does not advertise or otherwise solicit business in Texas. It did not create, control or employ a distribution system that distributed air cargo containers in Texas. There is no evidence that Petitioner designed its product in anticipation of sales in Texas.

In fact, there is no evidence that there has ever been a sale or lease of Petitioner's air cargo containers in Texas.

The issue was squarely presented and decided below. The Fifth Circuit's opinion expressly rests on its interpretation of *Asahi*. If additional conduct is required under the stream-of-commerce theory of specific jurisdiction, then Petitioner is not subject to the District Court's personal jurisdiction because there is no additional conduct. If additional conduct is not required, then Petitioner is subject to the District Court's personal jurisdiction. (There is no dispute that Petitioner could reasonably foresee that air cargo containers leased to American Airlines in California could be used on aircraft flying through

American Airline's hub at Dallas/Fort Worth International Airport.)

III.

The Fifth Circuit's decision misapplies *World-Wide Volkswagen* and improperly broadens the Fifth Circuit's already expansive interpretation of the stream-of-commerce theory of personal jurisdiction.

The lease for the air cargo containers was negotiated in Los Angeles; the air cargo containers were delivered to American Airlines at Los Angeles International Airport; lease maintenance of the containers is done only at Los Angeles International Airport. There is no evidence that Petitioner ever made any sales or leases in Texas, either directly or through any intermediaries. Petitioner's air cargo containers did not come to Texas because Petitioner or Nordisk Aviation Products, Inc. made a sale or lease in Texas. Instead, American Airlines unilaterally brought the containers to Texas.

This distinction is at the very core of *World-Wide Volkswagen*. Even the Justices in *Asahi* who "refused to require a showing of 'additional conduct' under the stream of commerce doctrine"[3] recognized the limits of *World-Wide Volkswagen*:

> "To illustrate the point, the Court contrasted the foreseeability of litigation in a State to which a consumer fortuitously transports a defendant's product (insufficient contacts) with the foreseeability of litigation in a State where the

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[3] See p. 4a, *infra*.

defendant's product was regularly *sold* (sufficient contacts). The Court stated:

> 'Hence if the *sale* of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, *directly or indirectly*, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its power under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce *with the expectation that they will be purchased by consumers* in the forum State.'
>
> . . . .
>
> "The Court in *World-Wide Volkswagen* thus took great care to distinguish 'between a case involving goods which reach a distant State through a chain of distribution and a case involving goods which reach the same State because a consumer . . . took them there.' "[4]

Three decisions relied on in the Fifth Circuit's opinion arguably fit *World-Wide Volkswagen* because personal jurisdiction was based on the defendant's product being sold in Texas. See *Gulf Consol. Serv., Inc. v. Corinth Pipeworks*, 898 F.2d 1071, 1074 (5th Cir.), *cert. denied*, 498 U.S. 900 (1990) ("Corinth's sole market for ATI oilfield casing

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[4] *Asahi*, 480 U.S. at 119-120 (quoting *World-Wide Volkswagen*, 444 U.S. at 297-298 & 306-307) (emphasis in original).

was Houston, Texas, and Corinth representatives frequently called on customers there. Corinth was the charterer of the vessels which carried the casing shipments from Greece to Houston."); *Irving v. Owens-Corning Fiberglass Corp.*, 864 F.2d 383, 387 (5th Cir.), *cert. denied*, 493 U.S. 823 (1989) ("Jugometal's fifteen-year history of bulk asbestos shipments to Houston, ties to the Houston testing laboratory, and knowledge that the shipping bags were cleaned in Houston" gave Jugometal "reason to foresee that its product was being sold in the forum state"); *Oswald v. Scripto, Inc.*, 616 F.2d 191, 197-98 (5th Cir. 1980) (foreign manufacturer had distributed millions of lighters; the lighter causing the injury was sold to the plaintiff in Texas).

Even in *Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081 (5th Cir. 1984), the court found that the manufacturer had distributed thousands of steel castings into the stream of commerce and "evidenced no attempt to limit the states in which its castings would be sold." *Id.* at 1085. Petitioner performed precisely this limiting function by not making any sales or leases in Texas.

The evidence here does not show that Petitioner shipped products to Texas, had a history of shipping to Texas, had any ties to any testing laboratory in Texas, employed any services in Texas as part of a chain of distribution, had a license agreement with any organization in Texas, or frequently called on customers in Texas. Unlike *Corinth*, *Irving* or *Oswald*, there was no evidence presented in opposition to this motion that Petitioner, directly or indirectly, sells or leases its products in Texas.

Without such evidence, there is no personal jurisdiction under *World-Wide Volkswagen*.

CONCLUSION

For these reasons, this Petition for Certiorari should be granted. The Fifth Circuit's decision improperly applies the stream-of-commerce theory of specific jurisdiction without appropriate constitutional limitations, makes foreseeability the touchstone of personal jurisdiction, and permits personal jurisdiction to be based upon the unilateral activities of others. The net result was the Fifth Circuit's rejection of Petitioner's argument "that it would be unfair to ask it to be amenable to suit 'anywhere that American flies.' " (p. 6a, *infra.*) American Airlines flies aircraft to virtually every state in the Union. The fact that 250 air cargo containers were leased and delivered to American Airlines in Los Angeles cannot, consistent with appropriate constitutional limitations, subject Petitioner to the personal jurisdiction of the courts of every state to which American Airlines flies. Some additional conduct on the part of Petitioner is constitutionally required and is absent in this case.

The question presented is important and should be settled. Foreign defendants fight personal jurisdiction battles in the courts of this country on a daily basis. The continuing conflict in the lower courts serves only to add

another layer of discovery expense and legal argument to each of these battles in stream-of-commerce cases.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS*
FOR THE FIFTH CIRCUIT

No. 92-9059
Summary Calendar

PHILIP D. TORGESON, and
KATHY TORGESON,

Plaintiffs-Appellants,

v.

NORDISK AVIATION PRODUCTS, INC., ET AL.,

Defendants,

HYDRO ALUMINUM NORDISK AVIATION
PRODUCTS, A/S,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

(4:92-CV-495-A)

(Filed Jul. 1, 1993)

Before GARWOOD, JONES, and EMILIO GARZA, Circuit Judges.*

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* Any typographical and/or incorrect punctuation found in the following Appendix pages were left intentionally to show accurately how the original documents appeared.

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

EDITH H. JONES, Circuit Judge:

In this appeal, we review a summary judgment granted to Hydro Aluminum Nordisk Aviation Products, A/S (Hydro Nordisk), a Norwegian company, finding no personal jurisdiction over it in connection with an accident that occurred at Dallas/Fort Worth Airport. After considering the law of personal jurisdiction in this circuit, we must REVERSE and REMAND for further proceedings.

The relevant facts are undisputed. On July 6, 1990, Philip Torgeson was injured at DFW Airport, Texas by an allegedly defective cargo container which may have been manufactured and/or reconditioned by Hydro Nordisk and rented by its agent Aviation to Torgeson's employer, American Airlines. When Torgeson and his wife sued Hydro Nordisk and its American subsidiary/agent Nordisk Aviation Products, Inc. (Aviation) in federal court, both defendants filed motions to dismiss for lack of personal jurisdiction. The district court denied the motion as to Aviation but granted that of Hydro Nordisk. Torgeson timely appealed.

Hydro Nordisk had no contacts with Texas other than as the maker of the product which allegedly caused harm; the company also sent an agent to Texas once or twice a year in order to meet with customers relating to their use of the company's product. While we agree with the district court that these contacts do not rise to the level necessary for general jurisdiction, we disagree that the plaintiffs did not present facts sufficient to constitute a *prima facie* case of specific jurisdiction over Hydro Nordisk for the harm allegedly caused by its product.

The court reviews this issue *de novo*, as a question of law, bearing in mind that Torgeson need only prove a prima facie case of personal jurisdiction prior to trial. *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1362 (5th Cir. 1990); *Command-Aire Corp. v. Ontario Mechanical Sales & Services, Inc.*, 963 F.2d 90, 93 (5th Cir. 1992).

Further, the review of jurisdiction has two components: (1) the defendant must have experienced minimum contacts with the forum state so it can reasonably anticipate being haled into court there; and (2) the exercise of personal jurisdiction under the circumstances must not offend traditional notions of fair play and substantial justice. *Asahi Metal Industry v. Superior Court of California*, 480 U.S. 102, 107 S. Ct. 1026, 94 L.Ed. 92 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L.Ed.2d 528 (1985); *Asarco, Inc. v. Grenela, Ltd.*, 912 F.2d 784 (5th Cir. 1990). Minimum contacts may result in either specific or general jurisdiction:

> When a cause of action arises out of a defendant's purposeful contacts with the forum, minimum contacts are found to exist and the court may exercise its "specific" jurisdiction. Given a single, substantial act directed towards the forum can support specific jurisdiction. Where a cause of action does not arise out of a foreign defendant's purposeful contact with the forum, however, due process requires that the defendant have engaged in "continuous and systematic contacts" in the forum to support the exercise of "general" jurisdiction over the defendant . . . contacts of a more extensive quality and nature are required.

Dalton v. R & W Marine, Inc., 897 F.2d at 1361-62 (citations omitted).

In this case, the appellants rely on a theory of specific jurisdiction based on Hydro Nordisk's having placed its product into "the stream of commerce". This theory of personal jurisdiction holds that when a manufacturer injects a product into the stream of commerce, and it is reasonably foreseeable that the product will be used in the forum state, the manufacturer or distributor should be subject to the jurisdiction of that state for injuries caused by that product. *See generally,* Murphy, *Personal Jurisdiction and the Stream of Commerce: A Reappraisal and a Revised Approach,* 77 Ky. L. J. 243 (1989) (and citations therein).

In *Asahi Metal Industry Co., supra,* the Supreme Court's most recent statement on personal jurisdiction and the stream of commerce, four justices favored a narrow interpretation of the stream of commerce doctrine. An equal number of justices, while concurring in the result, refused to require a showing of "additional conduct" under the stream of commerce doctrine. Because the court's splintered view of minimum contact in *Asahi* provides no clear guidance on this issue, the Fifth Circuit continues to use the stream of commerce standard as implied in *World Wide Volkswagen* and embraced by the circuit in a variety of cases. *Irving v. Owings-Corning Fibreglass,* 864 F.2d 383, 385-86 (1989), cert. denied 493 U.S. 823, 110 S. Ct. 83, 107 L.Ed.2d 49 (1989).

Several Fifth Circuit cases have found specific jurisdiction over defendants such as Hydro Nordisk in similar circumstances. For instance, in *Gulf Consolidated Services*

v. Corinth Pipe Works, 898 F.2d 1071 (5th Cir. 1990), *cert. denied* 498 U.S. 900 (1990), an action was commenced against a Greek oil field manufacturer whose casing had failed in a well drilled in Texas. The court held that specific jurisdiction did exist over a claim arising from the failure of the casings. *Id.* at 1073-74. As in the instant case, the court in *Corinth* acknowledged that Corinth was a foreign corporation not registered to do business in Texas or any location in the United States. It had no office, agent or assets in the United States, and the actual sale of the casings took place in Greece as did all other relevant financial transactions. *Id.* at 1073. The court based its conclusion on the fact that from the surrounding circumstances, Corinth could expect its casings would be used in Texas. Further, there were minimum contacts with Texas in the form of compliance with specifications set by a Dallas concern and Corinth's practice of shipping its product to Houston. The court distinguished the *Asahi* case, noting that in *Asahi* the forum state had no interest in litigating the dispute, *Id.* at 1074, whereas the interest of Texas in affording its resident a forum made it fair and reasonable to litigate here.

Corinth is supported by two other similar cases, *Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081 (5th Cir. 1984), and *Oswalt v. Scripto*, 616 F.2d 191 (5th Cir. 1980). Both cases rely on the analysis of *World Wide Volkswagen v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L.Ed.2d 490 (1980). In *Scripto*, the court held that since the defendant wanted to service a large market, it had indirectly made efforts to sell its cigarette lighters in Texas. Therefore, *Scripto* could reasonably anticipate being haled into court here. *Scripto*, 616 F.2d at 200. *Bean Dredging* reached

the same result. *Bean Dredging*, 744 F.2d at 1085. These cases took into account and rejected the argument of Hydro Nordisk that it would be unfair to ask it to be amenable to suit "anywhere that American flies," as they found that Scripto and Bean Dredging were amenable to suit where their products went, when those destinations were, as here, reasonably foreseeable by virtue of appellee's sales efforts to American at its DFW headquarters.

Finally, Hydro Nordisk maintains a variety of other arguments that might limit jurisdiction, including the assertion that appellants have not shown that it was Hydro's container that malfunctioned. Such factual arguments were not addressed by the district court and are therefore not considered by us. Inasmuch as the finding of personal jurisdiction over Hydro Nordisk is a *prima facie* one, further proceedings may demand that the case be dismissed.

For the foregoing reasons, the district court's judgment is **REVERSED** and the case as to Hydro Nordisk is **REMANDED.**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9059
Summary Calendar

D.C. Docket No. 4:92-CV-495-A

PHILIP D. TORGESON, and
KATHY TORGESON,

Plaintiffs-Appellants,

v.

NORDISK AVIATION PRODUCTS, INC., ET AL.,

Defendants,

HYDRO ALUMINUM NORDISK AVIATION PRODUCTS, A/S,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

JUDGMENT

(Filed Jul. 1, 1993)

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause

as to Hydro Nordisk is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiffs-appellants the costs on appeal to be taxed by the Clerk of this Court.

July 1, 1993

ISSUED AS MANDATE:

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

PHILIP D. TORGESON, ET UX KATHY TORGESON,	§	NO. 4:92-CV-495-A
Plaintiffs,	§	(Filed Nov. 12, 1992)
VS.	§	
NORDISK AVIATION PRODUCTS, INC. AND HYDRO ALUMINIUM NORDISK AVIATION PRODUCTS, A/S,	§	
Defendants.	§	

ORDER

Came on for consideration the motion of defendants, Nordisk Aviation Products, Inc., ("Aviation") and Hydro Aluminium Nordisk Aviation Products, A/S[1], ("Hydro") to dismiss for lack of personal jurisdiction or, in the alternative, to transfer venue. The court, having considered the motion, the response of plaintiffs, Philip D.

[1] This defendant was sued as "Nordisk Aviation Products, A/S," *see* plaintiffs' original compliant filed July 2, 1992, and has since been referred to by that name, *see* motion and brief for protective order filed October 27, 1992, and also as "Hydro Aluminium Nordisk Aviation Products a.s", *see* declaration of Jan-Arne Rønningen filed September 2, 1992. In all other filings, the name "Hydro Aluminium Nordisk Aviation Products A/S" has been used; therefore, the court understands this to be the correct name of the manufacturer defendant and has adopted use of this name in the style of the action.

Torgeson and Kathy Torgeson, the record and applicable authorities, finds that the motion should be granted as to defendant Hydro and denied as to defendant Aviation.

Plaintiffs allege that Philip D. Torgeson was injured while working with an aluminum cargo container manufactured by defendant Hydro, and leased by defendant Aviation to plaintiff's employer, American Airlines, Inc. For the purposes of the motion to dismiss, the allegations in plaintiffs' complaint are taken as true except to the extent that they are contradicted by defendant's affidavits. *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162, 1165 (5th Cir. 1985).

As plaintiffs point out, the lease agreement between defendant Aviation and plaintiff's employer provides that the agreement will be governed by, and construed in accordance with, the laws of the State of Texas. A party to the agreement, American Airlines, Inc., is a Texas corporation; and, the agreement provides that all notices to be given thereunder to American Airlines, Inc., shall be delivered or sent to its Texas place of business. Further, it is apparent from the agreement and from the facts of this action that defendant Aviation was aware that the leased aluminum cargo containers would be used by plaintiff's employer in Texas. The declaration of Timothy J. Garvin filed in support of defendants' motion reflects that defendant Aviation regularly sends agents to Texas to meet with American Airlines, Inc., to discuss American's use of aluminum cargo containers. The court finds that defendant Aviation could reasonably anticipate being haled into court here. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

As for defendant Hydro, the record does not reflect that it has the same kind of contacts with the State of Texas as does defendant Aviation. Defendant Hydro is not a party to the lease agreement between American Airlines, Inc., and defendant Aviation, pursuant to which the container that allegedly caused plaintiff's injuries was brought to Texas. Although defendant Hydro "has sent an agent to Texas approximately once or twice a year in order to meet with American Airlines, Inc.", regarding American's use of aluminum containers,[2] such contact is not sufficiently continuous or systematic as to support a reasonable exercise of jurisdiction. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779-80 (1984); *Stuart v. Spademan*, 772 F.2d 1185, 1190-91 (5th Cir. 1985). The unilateral acts of defendant Aviation in leasing containers manufactured by defendant Hydro to a Texas corporation is not an appropriate consideration when determining whether defendant Hydro has sufficient contacts with the forum to be haled into court here. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 416 (1984). The mere fact that a defendant has placed its products into the "stream of commerce" of the forum state is not alone sufficient contact to support an assertion of general jurisdiction. *See, e.g. Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 374-75 (5th Cir. 1987).

The court finds that the alternative motion to transfer venue should be denied. It appears that all events giving rise to plaintiffs' cause of action occurred in this district and that plaintiffs and most, if not all, of their witnesses reside here. Therefore,

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[2] Declaration of Jan-Arne Rønningen at 3.

The court ORDERS that defendants' motion to dismiss be, and is hereby, granted as to defendant Hydro and denied as to defendant Aviation. The court further ORDERS that defendants' alternative motion to transfer venue be, and is hereby, denied. The court determines that there is no just reason for delay in, and hereby directs, entry of final judgment as to the dismissal of plaintiffs' claims against defendant Hydro.

SIGNED November 12, 1992.

/s/ John McBryde
JOHN McBRYDE
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

PHILIP D. TORGESON, ET UX KATHY TORGESON,	§	NO. 4:92-CV-495-A
Plaintiffs,	§	(Filed Nov. 12, 1992)
VS.	§	
NORDISK AVIATION PRODUCTS, INC. AND HYDRO ALUMINIUM NORDISK AVIATION PRODUCTS, A/S,	§	
Defendants.	§	

FINAL JUDGMENT AS TO DEFENDANT HYDRO ALUMINIUM NORDISK AVIATION PRODUCTS, A/S

In accordance with the court's order of even date herewith.

The court ORDERS, ADJUDGES and DECREES that the claims of plaintiffs, Philip D. Torgeson, et ux Kathy Torgeson, against defendant Hydro Aluminium Nordisk Aviation Products, A/S, sued as "Nordisk Aviation Products, A/S", and also referred to as "Hydro Aluminium Nordisk Aviation Products, a.s.", be, and are hereby, dismissed for lack of personal jurisdiction. The court further ORDERS, ADJUDGES and DECREES that defendant

Hydro Aluminium Nordisk Aviation Products, A/S, have and recover its court costs from plaintiffs.

SIGNED November 12, 1992.

/s/ John McBryde
JOHN McBRYDE
United States
District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9059

PHILIP D. TORGESON and
KATHY TORGESON,

Plaintiffs-Appellants,

versus

NORDISK AVIATION PRODUCTS, INC., ET AL.,

Defendants,

HYDRO ALUMINUM NORDISK AVIATION
PRODUCTS, A/S,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

(Filed Aug. 9, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT: 8/5/93

/s/ Edith H. Jones
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

PHILIP D. TORGESON, ET UX, KATHY TORGESON,	§	
	§	CIVIL ACTION
	§	NO. 492CV-495 A
Plaintiffs,	§	
	§	
VS.	§	
	§	
NORDISK AVIATION PRODUCTS, INC. AND HYDRO ALUMINIUM NORDISK AVIATION PRODUCTS, A/S,	§	
	§	
	§	
	§	
	§	
Defendants.	§	

DECLARATION OF TIMOTHY J. GARVIN
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS
FOR LACK OF PERSONAL JURISDICTION

1. My name is Timothy J. Garvin. I am the President of Defendant Nordisk Aviation Products, Inc. I have personal knowledge of all matters stated herein. My knowledge was acquired in the course of my employment and job duties for Nordisk Aviation Products, Inc.

2. Nordisk Aviation Products, Inc., is a corporation formed and existing under the laws of the state of New York, with its principal place of business in Los Angeles, California. Nordisk Aviation Products, Inc., is 51% owned by Hydro Aluminium Nordisk Aviation Products, A/S, and 49% owned by Mercury Air Group, Inc.

3. Mercury Air Group, Inc., is a corporation formed and existing under the laws of the state of New York,

with its principal place of business in Los Angeles, California.

4. Nordisk Aviation Products, Inc., is engaged in the business of selling, repairing and leasing air cargo containers to commercial airlines. Although Nordisk Aviation Products, Inc. maintains approximately 700 containers for lease, its main business is selling Hydro Aluminium Nordisk Aviation Products, A/S's new products and not leasing used containers. Containers are repaired by Nordisk Aviation Products, Inc. in Los Angeles, California.

5. At the time of the accident alleged in Plaintiffs' Original Complaint, Nordisk Aviation Products, Inc., had leased approximately 250 air cargo containers to American Airlines, Inc., under the lease attached to this Declaration as Exhibit 1. The lease was negotiated on behalf of Nordisk Aviation Products, Inc., entirely from Los Angeles, California. The air cargo containers were delivered f.o.b. by Nordisk Aviation Products, Inc., to American Airlines, Inc., at Los Angeles International Airport. Under the Lease Agreement, maintenance of the containers is included only at Los Angeles International Airport. If the containers require maintenance, it was the responsibility of American Airlines, Inc. to return said containers to Nordisk Aviation Products, Inc. at Los Angeles International Airport. Any additional maintenance performed other than by Nordisk Aviation Products, Inc. was solely at the cost and control of American Airlines, Inc.

6. For the past six years on behalf of Nordisk Aviation Products, Inc., I have visited Texas approximately

once or twice a year in order to meet with American Airlines, Inc. and Continental Airlines, Inc. American Airlines, Inc. has never purchased any new product from Nordisk Aviation Products, Inc., but did pay Nordisk Aviation Products, Inc. approximately $125,000.00 in 1991 for rental of the containers which are used in wide body jets throughout the American Airlines system. Nordisk Aviation Products, Inc. has absolutely no control whatsoever as to where American Airlines, Inc. utilizes the leased containers.

7. Nordisk Aviation Products, Inc., never agreed to deliver any air cargo containers to American Airlines, Inc., in the state of Texas, nor did Nordisk Aviation Products, Inc., deliver any air cargo containers to American Airlines, Inc., in the state of Texas.

8. None of the directors or officers of Nordisk Aviation Products, Inc., reside or are domiciled in the state of Texas.

9. Nordisk Aviation Products, Inc., has no employees residing or domiciled in the state of Texas, nor has it contracted with persons residing in the state of Texas to act on its behalf with respect to marketing, distributing or servicing of any of its goods or products.

10. Nordisk Aviation Products, Inc., has no branch office or comparable facilities in the state of Texas, and has no telephone listings or mailing addresses in the state of Texas.

11. Nordisk Aviation Products, Inc., has no bank accounts or other tangible personal or real property in the state of Texas.

12. Nordisk Aviation Products, Inc., does not direct any of its advertising specifically towards residents of the state of Texas, nor does it advertise in any publications that are directed primarily toward residents of the state of Texas.

13. No meetings of the board of directors or shareholders of Nordisk Aviation Products, Inc., have been held in the state of Texas. None of the officers or directors of Nordisk Aviation Products, Inc., have attended business conferences or similar functions in the state of Texas.

14. The acts or omissions for which Nordisk Aviation Products, Inc., is sought to be held liable in this action, as described in the Original Complaint, all occurred outside of the state of Texas, if they occurred at all.

15. Nordisk Aviation Products, Inc., has not instituted any judicial proceeding in any state or federal court located in the state of Texas. Other than this lawsuit, no judicial proceeding has been instituted against Nordisk Aviation Products, Inc., in any state or federal court located in the state of Texas.

16. Other than the limited contact set forth herein, Nordisk Aviation Products, Inc., does not do and has not done business in the state of Texas.

17. Nordisk Aviation Products, Inc., is not and has not been required to pay and does not pay and has not paid taxes of any kind to the state of Texas or its political subdivisions.

18. Nordisk Aviation Products, Inc., has not designated any person residing in the state of Texas as an

authorized agent for service of process, and has not filed or indicated its consent to service of process in the state of Texas.

19. Nordisk Aviation Products, Inc., does not own and has not owned stock, securities, negotiable or non-negotiable instruments, or commercial paper of any kind in the state of Texas.

20. Nordisk Aviation Products, Inc., has not conducted, performed or done a series of acts in the state of Texas for the purpose of realizing a pecuniary benefit.

21. It would be unreasonable to require Nordisk Aviation Products, Inc., to defend this action in courts within the sate of Texas.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED on this 6th day of August, 1992.

/s/ Timothy J. Garvin, President
TIMOTHY J. GARVIN

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

PHILIP D. TORGESON, ET UX, KATHY TORGESON, Plaintiffs,	§	CIVIL ACTION NO. 492CV-495 A (Filed Sept. 2, 1992)
vs.	§	
NORDISK AVIATION PRODUCTS, INC. and NORDISK AVIATION PRODUCTS, A/S, Defendants.	§	

DECLARATION OF JAN-ARNE RØNNINGEN IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

1. My name is Jan-Arne Rønningen. I am the Managing Director of Defendant Hydro Aluminium Nordisk Aviation Products a.s I have personal knowledge of all matters stated herein. My knowledge was acquired in the course of my employment and job duties for Hydro Aluminium Nordisk Aviation Products a.s.

2. Defendant Hydro Aluminium Nordisk Aviation Products a.s is a corporation formed and existing under the laws of the Kingdom of Norway, with its principal place of business in Holmestrand, Norway.

3. Hydro Aluminium Nordisk Aviation Products a.s is engaged in the business of manufacturing and selling aluminum products.

4. Hydro Aluminium Nordisk Aviation Products a.s is not incorporated in the state of Texas, nor has it qualified to do business in the state of Texas. Hydro Aluminium Nordisk Aviation Products A.S. has no subsidiaries incorporated or qualified to do business in the state of Texas.

5. None of the directors or officers of Hydro Aluminium Nordisk Aviation Products a.s reside or are domiciled in the state of Texas.

6. Hydro Aluminium Nordisk Aviation Products a.s has no employees residing or domiciled in the state of Texas, nor has it contracted with persons residing in the state of Texas to act on its behalf with respect to marketing, distributing or servicing of any of its goods or products.

7. Hydro Aluminium Nordisk Aviation Products a.s has no branch office or comparable facilities in the state of Texas, and has no telephone listings or mailing addresses in the state of Texas.

8. Hydro Aluminium Nordisk Aviation Products a.s has no bank accounts or other tangible personal or real property in the state of Texas.

9. Hydro Aluminium Nordisk Aviation Products a.s does not direct any of its advertising specifically towards residents of the state of Texas, nor does it advertise in any publications that are directed primarily toward residents of the state of Texas.

10. No meetings of the board of directors or shareholders of Hydro Aluminium Nordisk Aviation Products a.s have been held in the state of Texas. None of the

officers or directors of Hydro Aluminium Nordisk Aviation Products a.s have attended business conferences or similar functions in the state of Texas.

11. The acts or omissions for which Hydro Aluminium Nordisk Aviation Products a.s is sought to be held liable in this action, as described in the Original Complaint, all occurred outside of the state of Texas, if they occurred at all.

12. Hydro Aluminium Nordisk Aviation Products a.s has not instituted any judicial proceeding in any state or federal court located in the state of Texas. Other than this lawsuit, no judicial proceeding has been instituted against Hydro Aluminium Nordisk Aviation Products a.s in any state or federal court located in the state of Texas.

13. For the past several years Hydro Aluminium Nordisk Aviation Products a.s has sent an agent to Texas approximately once or twice a year in order to meet with American Airlines, Inc. Other than specific contacts with American Airlines, Inc. relating to American's use of aluminum containers, Hydro Aluminium Nordisk Aviation Products a.s does not generally do and has not generally done business in the state of Texas.

14. Hydro Aluminium Nordisk Aviation Products a.s is not and has not been required to pay and does not pay and has not paid taxes of any kind to the state of Texas or its political subdivisions.

15. Hydro Aluminium Nordisk Aviation Products a.s has not designated any person residing in the state of Texas as an authorized agent for service of process, and

has not filed or indicated its consent to service of process in the state of Texas.

16. Hydro Aluminium Nordisk Aviation Products a.s does not own and has not owned stock, securities, negotiable or nonnegotiable instruments, or commercial paper of any kind in the state of Texas.

17. Hydro Aluminium Nordisk Aviation Products a.s has not conducted, performed or done a series of acts in the state of Texas for the purpose of realizing a pecuniary benefit.

18. It would be unreasonable to require Hydro Aluminium Nordisk Aviation Products a.s to defend this action in courts within the state of Texas.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED on this 25 day of August, 1992.

/s/ Jan A. Rønningen
JAN-ARNE RØNNINGEN